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A Comparative Study of Copyright Law in PRC and USA against Online Music Piracy: Problems and Solutions for a Modern Music Industry

中美对抗线上音乐盗版的著作权法比较研究-现代音乐产业的问题和解决方案

作者姓名
Christopher Dilts

指导教师姓名： 郭懿美 Professor Guo Yi Meei

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摘要

21 世纪的渐进版权法的发展所面对的问题在中国和美国都很具有挑战性，包括在法律，政治，经济，和发展结构这些方面。在关于音乐著作权的相关法律上，科技进步所带来的无限制的互联网传播使这个问题尤其严重。尽管从起初相对宽松的版权限制发展到有明确结构化的法律来保护知识产权所有者这个角度，美国和中国的法制发展过程非常类似，但两国这个过程的时间线却非常不同.

尽管美国在工业化和殖民地发展阶段采取了宽松的版权保护政策，现代化的美国社会需要一个更加严格的环境来应对 21 世纪的科技发展所带来的难题。相反，由于文化、经济和政治上的种种原因，在版权法律保护上，中国的发展在过去十年才复制了美国的版权改革，这使得中国适应了高度发展和激烈竞争的音乐市场。两国所采取的法律发展途径都很大程度上受到了两个因素的影响，一是市场上的音乐人需要通过合理的产品定价来获得适当的报酬进而刺激继续创新，二是创造更为方便的环境从而被动地减少网络盗版的诱惑和。美国一些典型的案例证明了相对容易的诉讼文化和对于版权的过度保护会反而伤害创新甚至威胁到了整个音乐产业的生存。相比之下，百度的庭外和解和政府的一些例如“剑网行动”等地质盗版的行动在当时仍在发展的音乐产业中已经展示出了多种可行的替代方案

更大的立法行动和法律发展正在地平线上，两个国家版权保护和著作权法的新正借着前车之鉴迈向新的时代。

关键词:

合理使用, 著作权法, 音乐产业, 网络音乐盗版

Abstract

The problems facing the 21st century of progressive copyright law development in the PRC and USA are both challenging, and unilateral across legal, political, economic, and development structures of both countries. Pertaining to music copyrights, this problem is exacerbated through the technological onslaught of ubiquitous internet access without restrictions. While the legal development of both countries is similar in the aspects of initial lax copyright restrictions evolving into definite structured legal protection for intellectual property holders, it is done on a significantly different timescale for the PRC and the USA respectively.

While initially lax in its copyright protection during its industrial and colonial developmental phase, the modern-day USA required a stricter environment to accommodate its difficult problems evolving into the technological landscape of the 21st century. Conversely, due to cultural, economic, and political reasons, the 'ramping up' of legal copyright protection over the past 10 years in regards to the PRC has mirrored past copyright reform in the US, enabling the PRC to adapt its music market in the face of significantly advantaged and already-established competition. Both countries' paths of legal evolution were strongly shaped by the dual-pincer vice of market needs of proper remuneration for musicians to stimulate innovation paired with reasonable product pricing and convenience to passively draw away the attractive lure and ease of internet copyright infringement. Typical case studies in the USA demonstrated the litigious culture and backlash associated with excessive entitlement of copyright protection, stifling innovation and almost destroying an industry. In comparison, the emergence of Baidu settlement, paired with active government programs such as the "Sword Net" campaign to discourage piracy have shown viable alternatives in the face of an hitherto undeveloped music industry.

With the prospective dawn of larger legislative action in both countries on the horizon, a new era of copyright legal reform observes its past as a logical indicator to where its future may be directed.

Key Words:

Fair Use, Copyright Law, Music Industry, Online Music Piracy

Abbreviations

CNNIC – The China Internet Network Information Center

DMCA - Digital Millennium Copyright Act of 1998

DRM – Digital Rights Management

ISP - Internet Service Provider

RMI – Recorded Music Industry

NCAC – National Copyright Administration of China

OCILLA – Online Copyright Infringement Liability Limitation Act

OMD – Online Music Distribution

OSP – Online Service Providers

PCOMD – Platform Content Online Music Distribution

RIAA – Recording Industry Association of America

TRIPS – Trade-Related Aspects of Intellectual Property

WTO – World Trade Organization

UCC – Universal Copyright Convention

Table of Contents

Introduction

Copyright and intellectual property in any country is a complex creature, simultaneously defending the rights of intangible property for billions while concurrently allowing for innovation, creativity, and imagination. In a perfect world, copyright law would be fully international, transferrable, and multilateral in its scope world-wide, but due to differing developmental needs in various countries around the world, this many times is not the case. In addition, the music industry has a severe economic dependence on copyright law and its enforcement pertaining to songs, lyrics and recordings. Looking at The People's Republic of China and The United States, one sees many similarities in IP protection and the differences are quite logical. Humorously enough, even though China is many times criticized by the United States as being lax in its copyright protection laws, the two countries historically and philosophically have more in common than one would think. By focusing the discussion on a smaller, more specific, and less rigid platform of copyright law within these two countries, such as the music and entertainment industry, we are able to grasp a crisper understanding of the legal atmosphere, cultural stipulations, and business necessities of each country's laws in relation to the economic needs of the music industry.

In its most rudimentary iteration, IP law has three focuses: trademarks, patents, and copyright. In regards to music, the copyright aspect is obviously the most important and directly relevant. Similar to all processes, the creation of a song and thus its copyright protection begins with the simple initiative of the actual creative act in itself: a song is written. According to international standards, the song being written constitutes a copyright automatically being made. Following the creation of a song, the recording of the piece is the second copyright created. These two copyrights of composition and recording are effectively what are handled by the rest of the music industry via performance, promotion, distribution, and reproduction.

In the context of music copyright protection, there are more specific subtleties compared to written works, films, or other forms of art. After looking at a brief historical introduction of both countries, a more transparent debate can take place in a comparative study of the evolution of copyright law in United States versus People's Republic of China.

I. Music Copyright Historical Background

A. United States

Copyright law in the United States attempts to fairly balance the needs of the artist, music industry, and listener, but in its long arduous passage has lately been the subject of much dispute as to the effectiveness of this balance. A summary glance at its founding, and consequent amendments will clarify the comparative study. Fundamentally, copyright law in the U.S. derives from the Constitution, when James Madison and Charles C. Pickney submitted proposals granting copyright protection for a short amount of time.

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. Article 1, Section 8, Clause 8*"*

The first copyright act was the Copyright Act of 1790, and the act allowed authors to publish their works protected for up to 14 years, renewable by an additional 14 years. Humorously enough, the exclusive rights granted only covered written works of "maps, charts, and books" and didn't cover the works of foreign authors. The 1790 act required a proper copyright notice otherwise it was considered in the public domain. The first revision of the act was in 1831 with the Copyright Act of 1831, thus doubling the initial copyright term (yet holding the renewal time to 14 years) while simultaneously altering the formality registration requirements. Subsequent copyright legislation such as the Copyright Act of 1909 further extended the term to 28 years with a 28 year renewal period, but the first modern-day fundamental copyright law was the Copyright Act of 1976.

When Congress created the Copyright Act of 1976, it drafted legislation that clearly states copyright holders' basic rights, fair use, and the terms of expiration in relation to the author's death. The Copyright Act created initially was later subject to many amendments and changes over the next century and onward into the twenty-first millennium. Exclusive rights, fair use, terms of protection, transfers of copyright, and copyright registration are some of the few concepts specified in the Copyright Act.

Exclusive Rights given to the copyright owner Section 106 details the exclusive rights held by all copyright owners:

"The owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission." [1]

This sixth right was added in 1995, but not present during the initial drafting of the Act.

Fair Use, the allowance of portions of copyrighted materials to be used without permission from the owner, was not initially codified into the Copyright Law, but made it into the 1976 Act. The 1976 Act codified Fair Use for the first time as a proper defense against copyright infringement although most federal courts had used it under common law from a previous British law. Typically, fair use is used as a defense in the case of possible copyright infringement from news reporting, educational purposes, or research.

1. the purpose and character of the use (commercial or educational, transformative or reproductive);
2. the nature of the copyrighted work (fictional or factual, the degree of creativity);
3. the amount and substantiality of the portion of the original work used; and
4. the effect of the use upon the market (or potential market) for the original work. [2]

[1] 17 U.S.C § 106.

Terms of protection began at a paltry 14 years, but this might partially be due to the average life span being much shorter. Eventually, the terms of protection grew to 75 or 90 years after the author's death. Of course, the optimal term for copyright protection is a subject of continual debate, but generally is seen best as revolving around the author's lifespan. The basic exchange in a copyright is an inherent one, and leans heavily on the copyright term itself. Increasing copyright term length encourages the creation of new works, but simultaneously limits access to already protected works. "Extending term on these works prolongs the copyright monopoly and therefore reduces welfare by hindering access to, and reuse of, these works."[3]

Subsequent legislation in the United States further defined modern-day issues regarding digital copyrights and works disseminated on the internet. The Copyright Act of 1992 removed the renewal requirements, and renewal no longer required formal registration. The Copyright Term Extension Act of 1998 extended copyright terms significantly to 95 or 120 years or life plus 70 years. The same year, the infamous Digital Millennium Copyright Act of 1998 (DMCA) criminalized creation or dissemination of any technology used to circumvent copyright infringement in the U.S. in response to rampant software, music, and movie piracy. In addition, it criminalized the circumventing of Digital Rights Management (DRM) placed on any copyrighted material.

The DMCA was a great leap into modern copyright law in the United States, setting the standards for criminalization of IP infringement and copyright violation across all spheres of IP law. Not only did it criminalize the circumvention of DRM but it also criminalized the circumvention of access control.

Yet it is generally considered that the DMCA has been a great success even though it was initially fairly infamous among netizens and internet freedom advocates. The DMCA was considered by many to be the opening legal act of the Digital Age, and the foundation-setter to all future legislation in regards to internet use and its consequences. In fact, "Today's internet is largely an outgrowth of the much-reviled Digital Millennium Copyright Act that lawmakers passed in 1998, and President Clinton signed into law." The DMCA in effect provides immunity to intermediaries such as ISPs and websites from the copyright infringements of their user-base.

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[2] 17 U.S.C. § 107

[3] Pollock, Rufus (2009-06-15). "FOREVER MINUS A DAY? CALCULATING OPTIMAL COPYRIGHT TERM". University of Cambridge. Archived from the original on 2013-01-12. Retrieved 2015-01-11.

In order to use that 'safe harbor' the service-provider must remove the infringing material and immediately send a takedown notice. While this provides ISPs, such as Comcast or Verizon, and websites, such as YouTube, Facebook, and Wordpress, with efficient tools to protect themselves against their user-base if infringement occurs, it is considered to have "opened the door to many abuses of free expression".

In fact, the enactment of the DMCA opened the door to hundreds of thousands of lawsuits by Viacom, Universal Music, and other video and audio copyright owners spammed at websites such as Youtube and Facebook. Videos posted onto Youtube with barely audible, but copyrighted music playing in the background were sent DMCA takedown notices (Viacom International Inc. v. YouTube, Inc.). The difficulty comes with the fact that, "There is no bright-line rule defining fair use. The factors include how much of the original work was used, whether the new use is commercial in nature, whether the market for the original work was harmed, and whether the new work is a parody"[4] Some clarifications have been made towards the DMCA in 2000, 2003, 2006, and 2010, but none of them clarified the difficulties with this act in regards to "fair use".

A portion of the DMCA pinpointed problematic issues within DMCA and reinforced the general idea that ISPs are in-part responsible for the content that is floated on their networks. In comes the Online Copyright Infringement Liability Limitation Act (OCILLA). OCILLA is also known as DMCA 512, or the DMCA takedown provisions. In addition, it provides a "Conditional Safe Harbor" from legal action for all online service providers (OSP), internet service providers (ISP), and internet intermediaries (search engines, blogging platforms, cyber cafes, e-commerce portals, etc) provided they serve takedown notices in a timely manner to the copyright infringing user. OCILLA, as part of DMCA is a powerful infringement prevention device that creates a clear pathway from action to consequence for any copyright abusers. In exchange for compliance in serving a takedown notice on behalf of a copyright owner, the provider receives: protection from liability to its own customers, proper procedural instruction for removing and/or restoring material, and safe harbor against any copyright infringement claims. In essence, OCILLA provides a legal balance between needs of the internet user and the internet provider by exempting internet intermediaries from copyright infringement liability if the rules are followed.

[4] Kravetz, David. 10 YEARS LATER, MISUNDERSTOOD DMCA IS THE LAW THAT SAVED THE WEB. Wired. Published 10/27/08. http://www.wired.com/2008/10/ten-years-later/

B. People's Republic of China

China's Copyright Law has grown in leaps and bounds over the past 30 years due to strict requirements of international trade organizations and the omnipotence of a global economy. During this time, China has realized the importance of a reliable legal system to protect its unique mixed economic model and political atmosphere while simultaneously nurturing development at an astonishing pace. Although much of China's modern Copyright Law is derived from international copyright standards, there is a special twist. Whereas in the United States the primary goal of the Copyright legislation is to protect innovation and expression, Copyright Law in the P.R.C. is established for the additional purpose of promoting government agenda, in the building of "a socialist society that is advanced ethically and materially, and promoting the progress and flourishing of socialist culture and sciences." [5] In China, the government has power over the supervision and administration of "the publication and dissemination of works."[6] In the United States, the federal government isn't constitutionally allowed to wield such power over something intrinsically non-political anyways.

While most have heard of the massive corporate ugliness associated with the pre-internet music industry in the West, the coincidental intellectual property legal evolution in tandem with the advancement of internet ubiquity in China has led to some innovative takes on western copyright law. Although upon its inception it was considered possibly insufficient for modern copyright needs, modern copyright law in China has had less than twenty-five years to fully develop compared to four centuries of development in the West. In fact, there was no codified copyright protection even existent in the P.R.C. until 1990. The debate that swarmed around the 1990 Copyright Law helped to define the modern standing of the copyright as a figure in a socialist system. While initially compared with international standards the 1990 law was deemed quite inadequate, but it established the country's foundation for defending the rights of author's rights and assuaged the international community's worries that China would not take copyright protection seriously. Over the next 30 years, the legal position of China has moved closer to the Western model while still retaining its unique particularities necessary to fit its needs.

The 1990 Copyright Law of the PRC or 中华人民共和国著作权法 initially set the groundwork for all copyright law in China, and the copyright term as the life of the author plus 50 years, similar to the United States. Although it was observed as quite an improvement over the

[5] 中华人民共和国著作权法. Copyright Law of the People's Republic of China. Promulgated on September 7th 1990. Chapter 1. Article 1.
[6] Id. supra note 58, at art. 4

lack of copyright protection, the initial lack of effective enforcement showed the law to be somewhat inert in terms of real effective copyright protection. Soon after, the desire to join the World Trade Organization (WTO) and requirement to sign the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) set the bar for copyright standards in the country, and the 1990 Copyright Law was quickly amended in anticipation of conforming to international standards.

Major revisions and changes in 2001 shifted the focus away from a socialist philosophy and began to endorse private economic rights, creating seventeen different sub-groups of rights as well as establishing the boundaries of "fair use" (合理使用):

> (l) the right of publication, that is, the right to decide whether to make a work available to the public;
>
> (2) the right of authorship, that is, the right to claim authorship and to have the author's name mentioned in connection with the work;
>
> (3) the right of alteration, that is, the right to alter or authorize others to alter one's work;
>
> (4) the right of integrity, that is, the right to protect one's work against distortion and mutilation;
>
> (5) the right of reproduction, that is, the right to produce one or more copies of a work by printing, photocopying, lithographing, making a sound recording or video recording, duplicating a recording, or duplicating a photographic work or by any other means;
>
> (6) the right of distribution, that is, the right to make available to the public the original or reproductions of a work though sale or other transfer of ownership;
>
> (7) the right of rental, that is, the right to authorize, with payment, others to temporarily use cinematographic works, works created by virtue of an analogous method of film production, and computer software, except any computer software that is not the main subject matter of rental;
>
> (8) the right of exhibition, that is, the right to publicly display the original or reproduction of a work of fine art and photography;
>
> (9) the right of performance, that is, the right to publicly perform a work and publicly broadcast the performance of a work by various means;